APPENDIX H

Government Presentence Memo

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
UNITED STATES OF AMERICA

96-CR-115-A

v

KIMBERLY GOODMAN,
Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES

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IN THE UNITED STATES DISTRICT COURT
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v.

96-CR-115-A

KIMBERLY GOODMAN,
Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES

THE UNITED STATES OF AMERICA by and through its attorneys, Patrick H. NeMoyer, United States Attorney for the Western District of New York, and Anthony M. Bruce, Assistant United States Attorney, hereby files its memorandum setting forth the points and authorities to which the Court must look in determining if the "abuse of trust" Guideline (Guidelines § 3B1.3) and/or the "acceptance of responsibility" Guideline (Guidelines § 3E1.1) apply in this case.

PRELIMINARY NOTE

At the outset, we note that paragraph 5 (p.12) of the Plea Agreement precludes the Government from "the right to argue that other specific offense characteristics, adjustments or departures are applicable to this case." Thus, in submitting this memorandum, our purpose is simply to supply the Court with the facts and the law. However, in accordance with the Plea Agreement, neither the Court nor counsel should view this Memorandum as advocating a position by the Government on either issue addressed herein. With this proviso, we believe that the Court could find that defendant Goodman's conduct technically constitutes an. "abuse of trust" even if the Court finds that defendant Goodman did not have a fiduciary duty running to the City of Loma Linda and that "abuse of trust" was not included in the specific offense characteristics as articulated in United States v. Jolly, 102 F.3d 46, 48 (2d Cir. 1996). In addition, we believe the Court could find that defendant Goodman's attempt to

withdraw her plea militates against her receiving a reduction to her base offense level for "acceptance."

ANALYSIS

A. Abuse of Trust

Guidelines § 3B1.3 states as follows:

> If the defendant abused a position of public or private trust or used a special skill in a manner that significantly facilitated the commission or concealment of the offense increase by 2 levels.

Prior to 1993, when § 3Bl.3 was amended, courts asked whether the defendant occupied a superior position relative to all people in a position to commit the offense. *United States v. Brown*, 941 F.2d 1300 (5th Cir. 1991) cert. denied, 502 U.S. 1008 (1991). The 1993 addition of application note 1 amplifies on the circumstances under which the enhancement is appropriate. It states as follows:

> "Public or private trust" refers to a position of trust characterized by professional or managerial discretion (i.e. substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are non-discretionary in nature. For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission of the offense (e.g. by making the detection of the offense or the defendant's responsibility for the offense more difficult) . This adjustment, for example, would apply in the cases of embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

The Second Circuit has viewed this language in a somewhat restrictive way. It has deemed that a typical

commercial relationship, wherein a defendant is privy to certain documents utilized in the crime, does not warrant application of the enhancement. *United States v. Viola*, 35 F.3d 37 (2d Cir.), cert. denied,__U.S.__,115 S.Ct. 1270 (1994) (machine operator at cargo facility did not occupy a position of trust even though his position as an employee gave him access to certain documents he inspected). In Jolly, a mail fraud case, the Second Circuit held that a corporate president who procured loans from investors through fraud did not have a fiduciary relationship with the victims, and reversed the district court's application of a two point enhancement for abuse of trust. The court construed Jolly's relationship as a contractual one wherein defendant had influence over the investors, but not of the type "beyond garden-variety borrowers." Id. at 48. It also held that where the fraud occurs in non-fiduciary, arms length relationships, the trust that is abused is simply the reliance of the victim on the misleading statements or conduct of the defendant and thus, is included in the specific offense characteristic for the offense.

Goodman's situation can be distinguished from that of the defendant in *Jolly*. Under the facts of this case, the Court could find that she was, in fact, a fiduciary. The City of Loma Linda did not loan its money to Refco as an investor. Rather it utilized Refco's services as one would use a bank, that is, to house the funds which it thought Weimer was using for investment. Thus, Goodman, as an employee of Refco, had duties that differed from those of the defendant in *Jolly*. The part of Goodman's job that brought her into this case as a defendant was her ability to intercept the audit confirmation statements and then falsely confirm to the City's auditor Loma Linda's balance in its account at Refco. The City relied on these misrepresentations and had no other source from which to verify the information she relayed to them. Thus the Court could find this to be a misuse of the discretionary authority entrusted to her by the victim city and could find this conduct constitutes an abuse of her position of trust vis-a-vis Refco's client, the City of Loma Linda.

Another component of the abuse of trust guideline is the requirement that the defendant's position "significantly facilitate"

the commission of the offense. This turns on whether the defendant's position increased the chances of succeeding or avoiding detection. See *United States v. Fritzson*, 979 F.2d 21 (2d Cir. 1992) (defendant's role as accountant assisted his tax fraud, even though someone without his training could have attempted it). Where an individual uses his knowledge of his field and parlays it into criminal activity, the enhancement could apply. (*United States v. Harris*, 38 F.3d 95 (2d Cir. 1994), cert. denied,__ U.S.__, 115 S.Ct. 1269 (1995) (in course of investment fraud, lawyer had one investor execute a power of attorney, drafted a codicil to another investor's will, and prepared documents for other investors to execute) . Certainly, the facts of this case would support a finding by the Court that defendant Goodman's conduct, the creation of the false performance reviews, is evidence of her facility in deceiving the City. Her conduct impeded the City's ability to uncover the fraud. Had she not falsified the information, it is highly probable that the City would have become aware of the fraud at an earlier date and minimized its losses. And it is also highly probable that Stephen Weimer's entire scheme would have been uncovered well before it was.

B. Acceptance of Responsibility

Guidelines § 3E1.1, inter alia, states:

(A) If a defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels; (b) if the defendant qualifies for a decrease under subsection (a) , the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted the authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

> (1) timely providing complete information to the government concerning his own involvement in the offense; or
> (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the court to allocate its resources efficiently, decrease the offense level by an additional level.

It is the sentencing judge who is in the unique position to evaluate a defendant's acceptance of responsibility. Such a determination is entitled to great deference on review and will not be disturbed unless it is without foundation. *United States v. Boothe*, 994 F.2d 63, 70 (2d Cir. 1993) and Guidelines § 3El.l application note 2). Acceptance of responsibility entails a showing of genuine remorse; however it should not be denied to a defendant who admits guilt but seeks an adjudication as to the extent of his sentence.

It is the defendant who bears the burden of proof with respect to the acceptance adjustment. The determination as to the applicability of the adjustment is a fact-driven issue in which credibility and demeanor play a critical role in determining whether a person is genuinely contrite. *United States v. Roger*, 895 F.2d 28 (lst Cir. 1990). It requires a balancing of subjective and objective factors. *United States v. Harris*, 882 F.2d 902 (4th Cir. 1989) .

The adjustment has been applied in instances where a defendant has pled guilty. See *United States v. Russell*, 913 F.2d 1288 (8th Cir. 1990) , cert. denied, 500 U.S. 906 (1991) ("[n]othing in the Guidelines requires the district court to find that a defendant exhibits any of the specific listed objective acts if it finds that he has accepted responsibility. . . Therefore, if a defendant pleads guilty for the offense that he or she committed, the district court may find that the defendant's guilty plea justifies the two level reduction.") But a defendant is not entitled to the two point reduction as a matter of right by pleading guilty. *Roger*, 895 F.2d at 29-30.

It is appropriate, in certain instances where a defendant has attempted to withdraw his or her plea, to deny the acceptance of responsibility reduction. *United States v. Reyes*, 13 F.3d 638 (2d Cir. 1994) (defendant in cocaine conspiracy case moved to withdraw plea after receipt of PSR and was denied acceptance of responsibility adjustment); see also *United States v. Muriel*, 111 F.3d 975 (lst Cir. 1997) (no abuse of discretion in denying acceptance of responsibility reduction where defendant attempted to withdraw plea); *United States v. Newson*, 46 F.3d 730 (8th Cir

1995) (defendant's assertion that attorney incorrectly gave him the impression that he would face a more severe sentence by going to trial was not sufficient ground to withdraw plea and an attempt to withdraw plea on those facts obviated the defendant's demonstration of acceptance of responsibility); *United States v. Haddad*, 976 F.2d 1088 (7th Cir. 1992) (defendant admitted crime but presented entrapment defense, denied acceptance of responsibility because cf such a position was "in total denial of his obligations."); cf. *United States v. Negron*, 967 F.2d 68 (2d Cir. 1992) (in drug case, since quantity is not an element of the offense, a defendant who admits guilt but requests determination as to quantity of narcotics with which he should be personally charged should not, on that account alone, be denied the adjustment.)

Thus, the facts exist for the Court to find that the acceptance of responsibility reduction under Guidelines § 3El.ldoes not apply.

III. CONCLUSION

It is this Court's prerogative as to whether to enhance defendant Goodman's sentence for abuse of trust or to reduce it due to acceptance of responsibility. In accordance with the plea agreement, the Government takes no position as to these issues.

Dated: Buffalo, New York, July 15, 1997.

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